IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

Supreme Court, U.S.
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NO. 84-744
UNITED STATES OF AMERICA, PETITIONER
v.
JAMES C. LANE AND DENNIS R. LANE

NO. 84-963
JAMES C. LANE AND DENNIS R. LANE,
PETITIONERS
v.
UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT-CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing defendants' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

2. Whether there was sufficient evidence to support defendants' convictions for mail fraud under 18 U.S.C. 1341.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 735 F.2d 799.

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[1] The appendices to each petition are identical.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (Pet. App. 22a-23a). On October 11, 1984, Justice White extended the time in which to file the government's petition for a writ of certiorari to November 20, 1984, and the petition was filed on November 6, 1984. The defendants' cross-petition for a writ of certiorari was filed on December 7, 1984. The petitions were granted on February 19, 1985 (J.A. 25, 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or

thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fed. R. Crim. P. 8 provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series or acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Respondent-Cross-Petitioners adopt, for the purpose of this brief, the contents of the Government's Brief under the heading, "Statement".

SUMMARY OF ARGUMENT

The Government, relying upon *United States v. Hasting,* 461 U.S. 499 (1983), argues that the Harmless Error Rule applies to violations of Rule 8(b), and that "there is no basis on which to except misjoinder from the harmless error doctrine." Respondents, however, rely on this Court's decision in *McElroy v. United States,* 164 U.S. 76 (1896), and contend that there are legitimate reasons to consider misjoinder *per se* reversible error without regard to Rule 52(a). Although "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless," misjoinder is inherently prejudicial and is so likely to prejudice the accused that the cost of litigating its effect in a particular case is unjustified.

In *McElroy v United States, supra,* this Court established a *per se* rule of prejudice arising from misjoinder. This rule is based on the inherent prejudice of misjoinder and the impossibility of determining, even retrospectively, that a defendant was not prejudiced by such error. The *McElroy* analysis of misjoinder is consistent with the rules of harmless error announced by this Court in *Chapman v. California,* 386 U.S. 18 (1967) and *Kotteakos v. United States,* 328 U.S. 750 (1946), as the risk of prejudice in the case of misjoinder is so great that it is logically impossible to declare the error harmless, and the judicial cost of reviewing the effect of misjoinder in particular cases is unjustified.

Although joinder of offenses promotes judicial economy, this benefit is outweighed by the inherent prejudice of misjoinder. Rule 8(b) of the Federal Rules of Criminal Procedure balances the competing considerations of judicial economy and presumptive prejudice from joinder. Rule 8 set the limits of tolerance beyond which the danger of prejudice outweighs the benefit, and any joinder

which does not fall within Rule 8 is *per se* impermissible. Rule 8 is a final determination, by the rule-making authority, of the permissible limits of joinder, and those competing interests should not be continually re-evaluated under the harmless error rule. Construction for which the Government contends would bring Rule 8 and Rule 52 into square conflict, rendering Rule 8 redundant of Rule 14. Such construction would result in an internal inconsistency within the rules, an unreasonable construction. The two sections must be construed and applied so as to bring them into substantial harmony, not square conflict.

Misjoinder is a violation of a substantial right, and therefore is an exception to Rule 52(a), and cannot be ignored. The Government contends that there is no basis on which to except misjoinder from the harmless error doctrine. However, Rule 52, by its own terms, has no application to violation of substantial rights. In *Kotteakos v. United States, supra,* this Court held that misjoinder is a violation of a substantial right, the right not to be tried *en masse.*

Rule 8 protects a goal of the judicial system independent of the judgment. The Rule protects a substantial right to an individual, personal determination of guilt or innocence and protects the individual's right to be free from governmental imposition and the incidental burdens of defending a criminal accusation. As Rule 8 promotes judicial goals independent of the factual validity of the judgment, application of the harmless error rule to misjoinder is inappropriate. Misjoinder in violation of Rule 8 calls for a *per se,* automatic reversal, not alone because of the factual prejudice to an individual defendant, but for the deterrent affect such a reversal and for the purpose of promoting obedience to the Rule.

Cross-Petitioners contend that the evidence is insufficient to support their convictions for Counts 2 through 4

of the Indictment. In order to convict the Cross-Petitioners on these Counts it is necessary for the Government to prove that the alleged use of the mail was for the purpose of executing a scheme or artifice to defraud. The use of the mails cannot be for the purpose of executing such a scheme as alleged in the Indictment, if the alleged mailings occurred after the scheme had reached its fruition. As the Cross-Petitioners irrevocably received the funds alleged in the Indictment as a part of the scheme, prior to the mailing alleged in the Indictment, they cannot be convicted of Counts 2 through 4 because such mailings were not for the purpose of executing the scheme. The scheme alleged in Counts 2 through 4 of the Indictment had reached fruition by the irrevocable delivery of the object funds from the insurance company to the Cross-Petitioners prior to the mailings alleged in the various Counts of the Indictment.

The facts of this case are substantially identical and indistinguishable from the facts in the case of *U.S. v. Ledesma,* 632 F.2d 670 (7th Cir. 1980). The Court of Appeals did not distinguish that the *Ledesma* case from the case at bar. Rather, relying upon *United States v. Shaid,* 730 F.2d 225 (5th Cir. 1984), and *United States v. Sampson,* 371 U.S. 75 (1962), and confusing foreseeability with intent, the Court of Appeals ruled that the Cross-Petitioners caused the use of the mails, and extended this foreseeable causation to a conclusion that the Cross-Petitioners intended to "lull" the defrauded insurance company by the use of the mails.

The case at bar is factually distinguishable from *United States v. Sampson,* 371 U.S. 75 (1962), relied upon by the Fifth Circuit Court of Appeals. In *Sampson* the indictment specifically alleged the lulling purpose and intent of the mailings. The intent to lull was a preconceived portion of the scheme in *Sampson.* This premeditated, calculated

intent to use the mails to lull, as alleged in *Sampson,* is absent from the facts in the case at bar.

The Court of Appeals has confused the foreseeability of mailing with the preconceived intent to lull by use of the mails. While is is true that the foreseeability of mailing justifies the conclusion that the defendant causes the mailing, this does not justify conclusion of an intent to use the mails. This confuses the *actus reus* element of a criminal offense with the required *mens rea,* intent. While it may be said that the Cross-Petitioners through their actions caused the mailings, the conclusion does not follow that they preconceived the use of the mail or intended to lull their victims. Proof of the *actus reas* of knowingly causing the use of the mails does not prove, nor substitute for proof of, an intent to lull. The evidence therefore is insufficient to prove that the Cross-Petitioners in fact intended a lulling use of the mails, and therefore the evidence is insufficient to prove that their use of the mails was for the purpose of executing a scheme. Accordingly, the evidence is insufficient to support their conviction on Counts 2 through 4 of the Indictment.

I. THE HARMLESS ERROR RULE IS INAPPLICABLE TO MISJOINDER

The Court of Appeals reversed the Respondents' convictions because of misjoinder in violation of Rule 8(b) of the Federal Rules of Criminal Procedure, ruling that "misjoinder is prejudicial *per se.*" *Lane v. United States,* 735 F.2d 799 (5th Cir. 1984). The Government contends that "a conviction may not be reversed on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure if the error was harmless." (Brief For The United States, p. 14.) Accordingly, the question presented by this case is whether the Court of Appeals erred in reversing without determining whether the mis-

joinder constituted harmless error. Is the harmless error rule of Rule 52(a) of the Federal Rules of Criminal Procedure applicable to violations of Rule 8(b), or is misjoinder *per se* reversible? The Government, relying upon *United States v. Hasting,* 461 U.S. 499, 590 (1983), argues that Rule 52(a) applies to misjoinder in violation of Rule 8(b), and that "there is no basis on which to except misjoinder from the harmless error doctrine." (Brief For The United States, p.20.) Respondents, however, rely on this Court's decision in *McElroy v. United States,* 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355, (1896), and contend that there are legitimate reasons to consider misjoinder *per se* reversible error without regard to Rule 52(a). Misjoinder is inherently prejudicial and violates a substantial right of a criminal defendant protected by Rule 8(b) of the Federal Rules of Criminal Procedure. Respondents contend that misjoinder in violation of Rule 8(b) of the Federal Rules of Criminal Procedure is *per se* reversible error, which cannot be deemed harmless.

A. Misjoinder In Violation Of Rule 8 (b) is Per Se Reversible Error Which Cannot Be Harmless.

The Government, relying upon *Hasting,* argues that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." (Brief For The United States, p. 17). "There are, however circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* _____ U.S. _____, 104 S.Ct. 2039 at 2046-47 (1984). In the case of some types of errors, "[p]rejudice . . . is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington,* _____ U.S. _____, 104 S.Ct. 2052 at 2067 (1984). The Government seems to believe that this case is governed by *Hasting,* and that

misjoinder is not exempt from harmless error review. (*Id.* at 20.) *Hasting* stated a general principle requiring harmless error review in those cases involving errors which may in fact be harmless, but *Hasting* did not create a blanket rule requiring appellate determination of prejudice with regard to every conceivable type of error. *Hasting* recognized that some errors can never be harmless, and therefore are not subject to Rule 52(a). *See also United States v. Cronic, supra; Strickland v. Washington, supra.* Misjoinder in violation of Rule 8(b) is such an error.

In *McElroy v. United States, supra,* this Court established a *per se* rule of prejudice arising from misjoinder. This rule is based upon the inherent prejudice of misjoinder and the impossibility of determining, even retrospectively, that a defendant was not prejudiced by such error. Interpreting the statutory forerunner of Rule 8, and ruling upon an assertion of harmless error from misjoinder, this Court observed that

> [i]t cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transaction. The order of consolidation was not authorized by statute and did not rest in mere discretion.

McElroy v. United States, supra, at 81, 17 S.Ct. at 33. This same view was reinforced by Chief Justice Burger when writing as Circuit Judge in *Ward v. United States,* 289 F.2d 877 (D.C. Cir. 1961). Relying on the *McElroy* case, he observed:

> . . . [W]here multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief. *Ingram v. United*

States, 272 F.2d 567, 570 (4th Cir. 1959). *See also* Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 921 (1960); *McElroy v. United States,* 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed 355 (1896); *United States v. Welch,* 15 F.R.D. 189, 190 (D.C. 1953).

Ward v. United States, supra, at 878. The cases holding that misjoinder cannot be harmless error have relied on *McElroy,* its reasoning and language. *See* 1 C. Wright *Federal Practice and Procedure,* §145, p. 530 n. 24 (2nd Ed. 1982).

The Government takes the position that *McElroy,* "while often cited for the proposition that misjoinder is prejudicial *per se,* in fact does not establish such a rule." Brief for the United States, at 25). Relying on *United States v. Granello,* 365 F.2d 990 at 995 (2nd Cir. 1966), the Government argues that *McElroy* is limited to its facts. To the contrary, the decision in *McElroy* clearly declares the inherent prejudice in misjoinder and the factual and logical impossibility of disproving prejudice "in such cases." This Court, in a global statement of the logical underpinnings of Rule 8, stated that "it cannot be said *in such case* that all the defendants may not have been embarrassed and prejudiced in their defence (sic) . . .". *McElroy v. United States, supra* at 81, 17 S.Ct. at 33. (Emphasis added). The language in *McElroy* indicates a *per se* rule of prejudice from misjoinder, and there is no indication that the rule was limited to the facts of that case. The rule of *per se* prejudice is a logical conclusion flowing from the factual and logical impossibility of disproving prejudice "in such case."

The *McElroy* analysis of misjoinder is consistent with the rules of harmless error announced by this Court in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Kotteakos v. United States,* 328 U.S. 750 (1946). In describing the standard of review for

harmless error, this Court has stated that

> [i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but a very slight effect, the verdict and the judgement should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.
>
> . . .
>
> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, supra at 764-765. Later, in announcing the standard of review for harmless *constitutional* error, the Court ruled that for an error to be harmless, it must have made no contribution to a criminal conviction. *Chapman v. California, supra.* "The question is whether there is a reasonable *possibility* that the evidence complained of might have contributed to the conviction." *Chapman v. California, supra* at 23, 87 S.Ct. at 827 (Emphasis added). In light of this standard of review, it is clear that misjoinder can never be harmless, as it is impossible to conclude that the error did not influence the jury, and in such cases, it is impossible to declare a belief beyond a reasonable doubt, that the error "made no contribution to . . . conviction." The risk of prejudice is so great that it is logically impossible to declare the error harmless.

B. There Are Substantial Reasons To Except Misjoinder From The Harmless Error Doctrine

1. *Misjoinder is inherently prejudicial.*

Contrary to the assertion of the Government, there is a reasonable basis upon which to except misjoinder from the harmless error doctrine. Improper joinder in violation of

Rule 8(b) is inherently prejudicial. *McElroy v. United States, supra* at 80, 17 S.Ct. at 32; *Lane v. United States,* 735 F.2d 799 (5th Cir. 1984); *United States v. Dennis,* 645 F.2d 517 (5th Cir 1981); *United States v. Marionneaux,* 514 F.2d 1244 (5th Cir. 1975). "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966). "The dangers of transference of guilt from one to another . . . subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States,* 328 U.S. 750 at 774, 66 S.Ct. 1239 at 1252, 90 L.Ed.2d 1557 (1946). "Because of the natural tendency to infer guilt by association, a defendant may suffer by being joined with another allegedly 'bad man'." *King v. United States, supra* at 704. Because misjoinder occurs under Rule 8(b) when a defendant is joined in an indictment containing charges that are unrelated to that defendant, there is a temptation to find that the trier of fact was able to keep the unrelated charge separated from the question of a particular defendant's guilt, and that misjoinder was therefore harmless. However, to apply this reasoning would nullify the requirements of Rule 8(b). *United States v. Hatcher,* 680 F.2d 438 at 442 (6th Cir. 1982). "When unrelated transactions involving several defendants are joined together . . . [t]he result is an inherent prejudice that no form of limiting instruction or cautionary charge could absolve . . . ." *United States v. Levine,* 546 F.2d 658 at 662 (5th Cir. 1977).

Joinder of offenses or parties has the salutory effect of promoting judicial economy. (*See* Brief For The United States, p. 18.) Rule 8 balances the competing considerations of the benefit to the court, prosecution, and the public with the presumptive prejudice inherent in the col-

solidation of parties or offenses by permitting joinder if certain requirements are met. Rule 8 "set the limits of tolerance" beyond which the danger of prejudice outweighs the benefit, and any joinder which does not fall within Rule 8 "is *per se* impermissible." *King v. United States, supra; United States v. Turkett,* 632 F.2d 896, reversed 452 U.S. 576. Rule 8 is a final determination, by the rule-making authority, of the permissible limits of joinder, *King v. United States, supra,* and these competing interests should not be continually re-evaluated under the harmless error rule. *See Kotteakos, v. United States, supra* at 773. For the Federal courts to engage in the same weighing and comparison of the competing interests of prejudice and judicial economy in each case of misjoinder, as requested by the government, would be inconsistent with Rules 8 and 14, and their history and purposes. In the case of joinder, Rules 8 and 14 perform the function of Rule 52(a).

Further, the construction for which the Government contends would bring Rule 8 and Rule 52 into square conflict, and would potentially eviscerate Rule 8, rendering it redundant of Rule 14. Certainly the rule-making authority intended no such construction and "the two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Kotteakos v. United States, supra* at 775, 66 S.Ct. at 1252-1253. Such an internal inconsistency in the Rules of Criminal Procedure is not a reasonable construction of the intent of the rule-making authority. As Professor Charles Wright has observed:

> Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if

> he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsman would have been better advised to allow the unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial.

1 C. Wright, *Federal Practice and Procedure,* 329 (1969). In his current edition, Professor Wright again reviews the question presented in this case, and acknowledging that "there is now a significant body of authority holding that misjoinder was harmless error," nevertheless concludes that "there remains much to be said for what was once the almost unanimous view that misjoinder is never harmless error." 1 C. Wright, *Federal Practice and Procedure: Criminal,* §145 at 531-532, (2d ed. 1982).

The Government proposes the application of Rule 52(a) to misjoinder, so the appellate courts will be required to engage "in the same sort of careful inquiry into the possibility of prejudice that is characterized in the proper application of the harmless-error rule in other contexts," a rule that would require appeal courts to "undertake the same examination with respect to Rule 8" as applied in reviewing complaints of prejudicial joinder and abuse of discretion under Rule 14. This construction would necessitate case-by-case, laborious, tedious, time consuming study of trial evidence by the reviewing court. But the Federal Courts are "far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that error may have affected a jury's deliberations." *United States v. Hasting, supra;* (STEVENS, J., concurring). "A defendant's liberty should not so often depend upon . . . [this Court's] strug-

gle with the particular circumstances of a case to determine from a cold record whether or not the . . . [error was] . . . harmless." *United States v. Hasting, supra* at 1990 n.6 (BRENNAN, J., concurring in part and dissenting in part) quoting *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980). [P]rejudice in . . . [some] circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington, supra* at 696.

2. *Misjoinder is a violation of a substantial right, an exception to Rule 52(a), and cannot be ignored.*

The Government contends that "there is no basis on which to except misjoinder from the harmless error doctrine." (Brief For The United States, at 20). However, Rule 52, by its own terms, has no application to violation of "substantial rights." Respondents contend that Rule 8 grants and protects a substantial right against mass trials, and therefore is an exception to the harmless error rule.

The harmless error doctrine embodied in Rule 52(a) is derived from former statutes.

> The language of these statutes emphasizes their limitation to matters of form and technicality. The early cases so held. There was a general reticence to apply the doctrine more broadly; in fact, in drafting Section 269 of the Judicial Code, the predecessor of the present rule, there was great hesitation in the Senate as to whether the doctrine should be applied to criminal cases at all.

Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 Hofstra L.Rev. 533 at 539 (1978). The purpose of the Rule in its final statutory for was authoritatively stated to be

> [t]o cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded. [But] [t]he . . . legislation affects

> only technical errors. If the error is of such a character that the natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it.

H. R. Rep. No. 913, 65th Cong. 3d Sess., 1; *Kotteakos v. United States, supra* at 760. The doctrine embodied in the present law has evolved from one governing "technical errors" and "errors of form" to one which is now held applicable to errors of all kinds, including errors of constitutional dimension. *Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 Hofstra Law Review, 533 at 540 (1978). But Rule 52(a) by its own terms still does not apply to errors affecting "substantial rights." *Id.,* at 540. Therefore, in addressing the question presented, this Court must determine whether misjoinder in violation of Rule 8(b) is a mere "technical error," or affects "substantial rights." *Id.,* at 540.

Respondents contend that Rule 8 confers, and is intended to protect, a substantial right of an individual accused of a crime. But what are substantial rights as opposed to mere technicality and form? Respondents contend that a constitutional or statutory right, privilege or procedure, granted to individuals for the purpose of protecting the integrity of the fact-finding process, or for the purpose of promoting independent goals of the criminal justice system, may constitute "substantial rights." Rule 8 is such a rule.

This Court has recognized that errors which constitute departure from a "specific command of Congress" are possible exceptions to the harmless error rule. *Kotteakos v. United States, supra* at 764-765; *Bruno v. United States,* 308 U.S. 287 at 294 (1939). Analyzing the legislative history of the harmless error rule, this Court has remarked

that

> the act was intended to prevent matter concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very diferent order of importance is the right of an accused to insist on a privilege which Congress has given him.

Bruno v. United States, supra at 294. Rule 8 constitutes a "statutory right expressly conferred," a substantial right, which carries the force of a "specific command of Congress." In *Kotteakos* the Court held that misjoinder did affect "the substantial rights of the parties. . . .

> That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.

Kotteakos, supra at 775, 66 S.Ct. at 1253. Rule 8 is an enactment of this Court under the rule-making authority delegated by Congress under Title 18, U.S.C. §3771. As such, it constitutes "a specific command," with the authority of Congress under the Necessary and Proper Clause, in furtherance of Article III of the Constitution. *Hanna v. Plumer,* 380 U.S. 460 at 472 (1965). We are dealing with statutory rights expressly conferred. *United States v. Graci,* 504 F.2d 411 at 414 (3rd Cir. 1974); *see Kotteakos v. United States, supra.* Congress has in Rule 8 and Rule 13 defined the permissible scope of joint trials of offenses and offenders. It has in Rule 14 provided a mechanism for protecting against prejudice even within that permissible scope. It seems a strained interpretation of the harmless error statute that it was intended to dilute statutory protections expressly granted. *United States v. Graci, supra* at 414; 1 C. Wright, *Federal Practice and Procedures,* §145 (2nd ed. 1982).

The process which is due to an accused includes rules and procedures designed to protect the integrity of the

fact-finding process and promote the factual accuracy of a verdict and judgment, and provide a trial whose result is reliable. *Strickland v. Washington, supra.* Thus, rules designed to limit or eliminate prejudice are substantial rights. But there are objects of the criminal justice system independent of the factual accuracy of a verdict or judgment.

When the integrity of the fact-finding process and the accuracy and reliability of the verdict and judgment is the substantial right which a rule or procedure is intended to protect, harmless error evaluation is appropriate. In the event that the integrity of the fact-finding process has not been compromised, and there is no possibility that an error could prejudice the accuracy of the judgment, then the defendant's substantial rights have in fact not been harmed, regardless of a breach of the rules intended to protect those rights. In such a case, there is no reason to reverse a doubtlessly valid verdict and judgment merely because of a harmless violation of a rule or procedure intended to protect the factual accuracy of that judgment. However, when the reliability of the verdict is not the sole concern of the rule of procedure which has been violated, and the substantial right granted to the defendant is intended to promote a goal of the judicial system independent of the factual accuracy of the judgment, then harmless error review is inappropriate. In such cases, errors are *per se* reversible, not because the violations of those rules could possibly affect the judgment or sentence, but because the rule is intended to promote a goal of the judicial system independent of the judgment. Such is the case with Rule 8(b).

To be sure, Rule 8(b) is a substantial right in the sense that it is designed to protect the integrity of the fact-finding process and insure the factual accuracy of a verdict and judgment. But, in addition, Rule 8 has the further purpose of protecting a substantial interest, and a goal of

the judicial system independent of the judgment. Rule 8 limits governmental imposition of the burdens of a criminal prosecution on an individual defendant. Rule 8(b) protects the defendant from the burden, time loss, expense, embarrassment and distraction attendant to mounting simultaneous defenses to multiple accusations in a case involving co-defendants. Guilt is both individual and personal. *Kotteakos, supra.* Criminal defendants such as the Respondents have the right to insist upon the judge and jury's undivided attention to the accusations against each of them, and no others. Rule 8(b) is designed to protect and insure that the trial of a criminal accusation is reasonably limited to individual and personal guilt. The Rule protects the substantial right to be free from governmental imposition and the incidental burdens of defending a criminal accusation. Rule 8(b) protects a defendant's substantial right to be left alone and free from the simultaneous defense of multiple, unrelated accusations.

As Rule 8 promotes judicial goals independent of the factual validity of the judgment, application of the harmless error rule to misjoinder is particularly inappropriate. As the purpose of Rule 8 is protection against imposition and mass trials, the factual accuracy and reliability of the judgment is not the sole concern. Therefore the harmless error rule has no application. Misjoinder in violation of Rule 8 calls for *per se,* automatic reversal, not alone because of factual prejudice to an individual defendant, but for the deterrent effect of such a reversal and for the purpose of promoting obedience to Rule 8. In this regard, it is important to recall that Rule 52(a) limits reversal to errors which affect "substantial rights," and is not limited to errors which affect the judgment. Accordingly, Rule 52(a), the harmless error rule, should have no application to misjoinder in violation of Rule 8(b). Rather, misjoinder should result in *per se* reversal, because it is a violation of a substantial right of a

criminal defendant.

The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one Defendant to be presented in the case against another charged with a completely dissociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. It is not "harmless error" to violate a fundamental procedural rule designed to prevent "mass trials." *Ingram v. United States,* 272 F.2d 567, 570 (4th Cir. 1959).

II. THE MISJOINDER OF THE RESPONDENTS WAS PREJUDICIAL, NOT HARMLESS

The Government contends that the misjoinder of the Respondent-Cross-Petitioners was harmless, arguing that the "testimonial and documentary evidence against Defendants, . . . was overwhelming," and that there was "no reasonable *probability* in the light of this evidence that the joinder . . . materially contributed to their convictions." (Brief For The United States, p. 27.) In addition, the Government relies upon the District Court's limiting instructions to protect Dennis Lane from prejudice. (*Id.* at 27.) Finally, the Government contends that misjoinder was harmless, arguing that "the new trials of Defendants would, in fact, be so substantially similar to the trial that they have already had that any conclusion of prejudice can only be deemed wholly implausible," and contending that evidence of the misjoined counts "would still be admissible . . . under Federal Rules of Evidence 404(b)." (*Id.* at 27-28.) The reliance of the Government on "overwhelming evidence," limiting instructions, and Rule 404(b) is mistaken. The Respondent-Cross-Petitioners contend that their misjoinder was in fact prejudicial, not harmless.

This Court admonished in *Chapman v. California,*

supra, against giving too much emphasis to "overwhelming evidence" of guilt, stating that errors affecting the substantial rights of the aggrieved party cannot be considered harmless. *See also Harrington v. California,* 395 U.S. 250 at 254, 89 S.Ct. at 1728. Accordingly, the Government's reliance upon "overwhelming evidence" is erroneous. "The question is whether there is a reasonable *possibility* that the . . . [error] complained of might have contributed to the conviction." *Chapman v. California, supra* at 23, 87 S.Ct. at 827 (emphasis added).

> [I]f one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, supra at 764-765. The question before the Court is not "whether there was sufficient evidence on which . . . [Respondent-Cross-Petitioners] could have been convicted without the . . . [error] complained of. The question is whether there is a reasonable *possibility* that the . . . [error] complained of might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85 at 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 71 (1963). An analysis of harmless error involves more than a determination of sufficiency of the evidence to support conviction, or a determination of the probability of error.

> It is not the Appellate Court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . The question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

Kotteakos v. United States, supra at 763-764, 66 S.Ct. at 1247. The Government's argument that "overwhelming" evidence leaves no "reasonable probability" of error from

misjoinder flies in the face of this Court's decisions in *Chapman v. California, supra,* and *Kotteakos v. United States, supra.*

The Government argues that its conclusion of harmless error "is buttressed by the District Court's instructions" intended to protect Dennis Lane from prejudice from misjoinder. (Brief for the United States, p. 27.) But,

> [w]hen unrelated transactions involving several defendants are joined together . . . [t]he result is an inherent prejudice that no form of limiting instruction or cautionary charge could absolve . . . .

United States v. Levine, supra. (Citations omitted). The very presence of limiting instructions is an implicit recognition of the potential for harm arising from joinder. The limiting instructions in this case may or may not have mitigated the prejudice to Dennis Lane, but their very presence reminds all except the Government of the inherent danger of prejudice from misjoinder. Respondents contend that that misjoinder contributed to their convictions and sentences, despite the limiting instructions.

The Government speculates that the retrial of these Respondents would be "substantially similar" to their previous trial, and based thereon, argues that the error is harmless. This is an erroneous standard of review for the determination of harmless error.

> It is not the appellate court's function to determine guilt or innocence . . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . .

Kotteakos v. United States, supra at 763-764, 66 S.Ct. at 1247. "The question is whether there is a reasonable *possibility* that the evidence complained of might have contributed to the conviction", *Chapman v. California, supra* at 23, 87 S.Ct. at 827, not speculation as to whether or not such error would be permissible upon retrial after

remand and severance. Speculation as to the future outcome of relitigation is irrelevant to a determination of whether or not the error complained of possibly contributed to the Respondents' convictions.

The Government argues that the evidence of misjoined counts introduced below would be admissible on retrial under Rule 404(b) of the Federal Rules of Evidence to show "intent or for similar purposes". (Brief For The United States, p. 28.) It is not at all clear that such evidence would in fact be introduced on retrial. A joint trial requires proof beyond a reasonable doubt, including the full proof of the offenses alleged in the indictment, even with cumulative evidence. But if there is no joinder, but rather separate trials on remand, there would be limited use of the evidence of other crimes solely for the purpose of proving *mens rea,* and not a total trial as in the case of joinder.

> Where evidence of prior criminal acts is proffered, the trial court has discretion to limit, or even to exclude, such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . . . Where multiple offenses are charged in an indictment, however, a trial judge must permit the prosecution to establish each of those offenses beyond a reasonable doubt.

United States v. Satterfield, 548 F.2d 1341 at 1346 (9th Cir. 1977).

Rule 403 permits the District Court to limit the admission of evidence of other acts when their prejudicial effect outweighs their probative value. Evidence of extraneous offenses is not routinely admissible under Rule 404(b), but is subject to the discretion of the Trial Court and its determination of its relative probative value or prejudicial effect. *United States v. Kirk,* 528 F.2d 1057 (5th Cir. 1976);

United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974). In fact, Rules 105, 403 and 404(b) assume that evidence of extraneous offenses is inherently prejudicial, as those rules require the Court's discretionary consideration of relative prejudice and probative value. Accordingly, it is not possible to conclude that misjoinder could not possibly contribute to conviction. Further, the Government may not at all be correct in its speculation that the District Count on remand would admit evidence of the misjoined counts. The District Judge, in her discretion, excluded some tape recorded evidence of the extraneous offense involved in Count 1 of the Indictment, relying specifically on Rule 403. Clearly, the District Court did in fact exercise its discretion to limit the prejudice from misjoinder, and there is no reason to speculate that the District Court would, upon remand, automatically permit the admission of evidence of extraneous offenses under Rule 404(b). Further, the Defendant's intent may not be a disputed issue of material fact upon remand, and therefore Rule 404(b) may be completely inapplicable and evidence of other offenses completely inadmissible under that rule. *United States v. Kirk, supra,* at 1061. A mere plea of not guilty does not place in issue the intent of the Defendant so as to permit introduction of evidence of similar conduct or crimes. At trial, the defense asserted was that the alleged use of the mails was not in the furtherance of the alleged schemes. If the Defendant does not take the witness stand and does not deny his intent, there is no reason to permit admission of evidence of other offenses under Rule 404(b), and such evidence would be inadmissible. If the Court considers Rule 404(b) evidence admissible regardless of the asserted defense, nevertheless, in the event that there is no dispute as to intent, the prejudicial effect of extraneous offense evidence still greatly outweighs the probative value of that evidence and such evidence should be excluded under Rule

403.

Implicit in the Government's argument is the assumption that remand would result in a severance of counts rather than a severance and separate trial of the Defendants. This conclusion is not at all certain. The error in this case was from misjoinder of *Defendants* in violation of Rule 8(b). The relief which the Respondents requested by their Motion for Severance and Separate Trials was a severance of Defendants, not Counts. On Remand, it would be permissible, and judicially economical, to sever the Defendants for two separate trials. (*See* Brief For The United States, p. 10, n. 5.) If, contrary to the Government's assumption, there is a separate trial of Dennis Lane on remand, absolutely no evidence of Count 1 of the Indictment would be admissible against Dennis. In the event of a joint trial of Counts 2 through 4 upon remand, proof of Count 1 of the Indictment should be excluded under Rule 403 as excessively prejudicial. In the event of a separate trial of J. C. Lane on remand, no evidence of Dennis Lane's perjury, alleged in Count 6, would be admissible against J. C. In the event of a joint trial of Counts 2 through 4 of the Indictment on remand, no evidence of Count 6 should be admissible against either of the Respondents.

Cross-Petitioners contend that they were in fact prejudiced by their misjoinder. The admission of evidence in support of the misjoined Count 1 possibly contributed to the conviction of Dennis Lane on the other Counts. The admission of evidence of the El Toro fire, in Count 1, displayed a picture of one family who had suffered two possibly arson-related fires in their commercial property within a short time span. This seems unlikely in the absence of arson. The very fact that Count 1 was misjoined with the other Counts resulted in this proof of an improbable course of events, which rendered it more likely

that the Respondents had in fact been involved in arson-for-profit in Counts 2 through 5 of the Indictment. In the absence of proof of the arson alleged in Count 1 of the Indictment, the fire relating to Counts 2 through 4 of the Indictment does not appear inherently improbable, and is more likely to appear as the possible result of an unfortunate casualty rather than arson. The additional proof of the arson in Count 1 of the Indictment makes the guilt of the Defendants on Counts 2 through 5 of the Indictment more probable. *Cf.* Fed. R. Cr. Proc. R. 404(b). As a result, it is not possible to declare beyond a reasonable doubt that the error from misjoinder of Count 1 of the Indictment did not contribute to the conviction of the Respondents on the other Counts in the Indictment.

The misjoinder of Count 6 of the Indictment resulted in prejudice to J. C. Lane, and it is not possible to say that proof of the perjury count did not contribute to J. C. Lane's sentence. Proof of Count 1 of the Indictment would tend to show J. C. Lane to be an arsonist involved in mail fraud. Counts 2 through 5 of the Indictment allege that, in addition to his own criminal activity, J. C. Lane actively involved his son in an arson-for-profit conspiracy. But proof of Count 6, Dennis Lane's perjury regarding events surrounding Count 5 of the Indictment, had the damaging effect of making it more likely that both Respondents were in fact guilty of the conspiracy alleged in Count 5. The evidence of perjury is clear evidence of Dennis Lane's knowledge and complicity in the conspiracy alleged in Count 5, and has the effect of making conviction on Counts 1 through 5 much more likely for both Respondents. The jury, having once determined that Dennis Lane was guilty of perjury in Count 6, as concerns statements regarding the conspiracy in Count 5, must necessarily conclude that there was in fact conspiracy as alleged. This proof of perjury breathes substance and

credibility into the allegations of Counts 1 through 5 and presents a clear picture, rather than mere inference, that J. C. Lane had in fact involved his son, Dennis Lane, in his schemes. J. C. Lane's culpability in involving Dennis Lane is blameworthy in addition to his personal criminal activity, and amounts to an aggravating circumstance which may very well have contributed to the sentence which he received. Accordingly, it is not possible to conclude beyond a reasonable doubt that the misjoinder in this case did not contribute to the judgment and sentence. *Cf. Chapman v. California, supra, Kotteakos v. United States, supra.*

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF THE RESPONDENTS ON COUNTS 2 THROUGH 4 OF THE INDICTMENT

Counts 2 through 4 of the indictment in this case allege the offense of mail fraud for the purpose of defrauding an insurance company and receiving money from that company in payment of fraudulent claims for insurance benefits payable by reason of a fire loss. In order to convict, it is necessary for the Government to prove that the alleged use of the mails was "for the purpose of executing such scheme or artifice" as alleged in the Indictment. 18 U.S.C. §1341. The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by the appropriate state law. *Kann v. U.S.,* 323 U.S. 88 (1944). The use of the mails cannot be "for the purpose of executing such scheme" as alleged in the indictment, if the alleged mailing occurs after the scheme has reached its fruition. *Kann v. U.S., supra.* The Indictment in Counts 2 through 4 alleges that the purpose of the scheme was to defraud the

insurance company and to receive money from the insurance companies. Therefore, if the Cross-Petitioners irrevocably received the funds alleged in the Indictment, prior to the mailing they cannot be convicted of Counts 2 through 4 because such mailings would not be "for the purpose of executing such scheme." *Kann v. U.S., supra; Parr v. U.S.*, 363 U.S. 370 (1960); *U.S. v. Maze*, 414 U.S. 395 (1974).

The facts of this case conclusively show that the schemes alleged in Counts 2 through 4 of the Indictment had reached fruition by the irrevocable delivery of the object funds from the insurance companies to the Defendants prior to the mailings and uses of the mails alleged in the various Counts of the Indictment. The Cross-Petitioners received the alleged checks for insurance money in person, in Amarillo, Texas, from the insurance adjuster who issued those checks personally in Amarillo, Texas and delivered them to the Defendants. The evidence further shows that the Cross-Petitioners deposited those insurance checks to their bank accounts, and that the bank credited their accounts with the funds immediately and irrevocably. All of this occurred prior to the mailing alleged in the Indictment. The Government witness, Mr. Bill Liles, the adjuster for Trinity Universal Insurance Company, the insurance company involved in Counts 2, 3 and 4 of the Indictment, testified that all checks pertinent to Counts 2, 3 and 4 of the Indictment, were delivered in Amarillo, Texas, prior to the mailing of the proofs of loss in relation to said checks.

The evidence in this case concerning Counts 2 through 4 established the allegations concerning the date of delivery of insurance checks to the Cross-Petitioners, and the mailing dates, and as alleged in the Indictment Counts 2 through 4. Nevertheless, it is readily apparent from the Indictment and from the evidence in this case, that all funds

received by Cross-Petitioners were delivered to them in person, in Amarillo, Texas, prior to the mailings alleged in the indictment. The dates of receipts of funds by the Cross-Petitioners, and the date of mailings may be graphically displayed as follows:

Count	Date of Check Receipt	Date of Mailing
COUNT 2	5-9-80	5-15-80
COUNT 3	5-21-80	8-6-80
COUNT 4	5-30-80	9-18-80
	9-16-80	

The facts of this case are substantially identical and indistinguishable from the facts in the case of *U.S. v. Ledesma,* 632 F.2d 670 (7th Cir. 1980). In the *Ledesma* case, the defendant was charged with mail fraud involving a scheme to defraud a casualty insurancy company by submitting a false proof of loss representing the theft of a mobile home. In that case, the claims adjuster testified that he personally delivered the insurance check for the claim to the defendant. Just as in this case, in the *Ledesma* case, the insurance check was signed and issued personally to the defendant and received prior to the mailing of the proof of loss which was alleged as the use of the mails. It was undisputed that the insurance adjuster did not mail the alleged proof of loss until *after* the check was delivered in person. Accordingly, the Seventh Circuit reversed the judgment of conviction in the *Ledesma* case, relying upon *U.S. v. Maze, supra,* and *U.S. v. Rauhoff,* 525 F.2d 1170 (7th Cir. 1975).

The opinion of the Court of Appeals did not distinguish the *Ledesma* case from the case at bar. Rather, noting that in *Ledesma* "the Seventh Circuit relied upon the Supreme Court's reasoning in *United States v. Maze, supra,*" the Court of Appeals undertook to distinguish the *Maze* case from the present case. The Court of Appeals noted that

the use of the mails could have been forseen, stating that

> [w]e have held that when an individual does an act with knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be foreseen, even though not actually *intended,* then he/she "causes" the mails to be used.

Lane v. U.S. supra; see United States v. Shaid, 730 F.2d 225, 229 (5th Cir. 1984). Based upon this reasoning, and confusing foreseeability with intent, the Court of Appeals ruled that the use of the mails was caused by Cross-Petitioners, and extended this foreseeable causation to a conclusion that the Cross-Petitioners intended to "lull" the defrauded insurance company by the use of the mails. Distinguishing *United States v. Maze, supra,* the Court of Appeals relied on *U.S. v. Sampson, supra,* to rule that the mailings in this case, although occurring after the receipt of fraudently obtained funds, were in execution of fraud because they were designed to lull the victims into a false sense of security. This is a misconstruction and is in conflict with these applicable decisions of this Court.

The case at bar is factually distinguishable from *United States v. Sampson, supra,* relied upon by the Fifth Circuit Court of Appeals. In *Sampson,* the indictment specifically alleged that the mailings were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. *U.S. v. Sampson, supra* at 80-81. In *Sampson,*

> [a]lthough the money had already been obtained, the plan still called for a mailing of the accepted application together with a form letter to the victims "for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and

> fraudulently represented that they would perform." . . .
>
> In short, the indictment alleged that the scheme, as originally planned by the defendants and as actually carried out, included fraudulent activities both before and after the victims had actually given over their money to the defendants.

Id., at 78. This premeditated, calculated *intent* to use the mails to lull, as in *Sampson,* is absent from the facts in the case at bar and in *United States v. Maze, supra.* The intent to lull was a preconceived portion of the scheme in *Sampson.* This is not so in the case at bar. The Court of Appeals has confused the foreseeability of mailing, *see U.S. v. Shaid, supra,* at 229, (5th Cir. 1984), with the preconceived intent to lull by use of the mails. While it is true that the foreseeability of mailing justifies a conclusion that a defendant "caused" the mailing, *U.S. v. Shaid, supra,* this does not justify a conclusion of an intent to use the mails. This confuses the requirement of a voluntary act, or the *actus reus* of the criminal offense, with the required *mens rea* of the criminal offense, intent.

It is a basic principle of federal criminal jurisprudence that all criminal offenses include both elements of mental culpability, or *mens rea,* and the prohibited act, or *actus reus. Morisette v. United States,* 342 U.S. 246 (1952); *Liparota v. United States,* _____ U.S. _____, 105 S.Ct. 2084 (1985). This is of course true of the mail fraud statute, 18 U.S.C. §1341. *Cf. United States v. Stanford,* 589 F. 2d 285 at 295 (7th Cir. 1978); *United States v. Gibson,* 708 F. 2d 344 at 346 (8th Cir. 1983). The required mental state may of course be different for different elements of a crime, and one offense may include both specific and general intent elements, with different culpability for each. *Liparota v. U.S., supra,* at 2087. The general intent element of §1341 is knowledge, *i.e.,* "knowingly" commiting the *actus reus* of mailing or causing the use of

the mails. The *actus reus of* §1341, as alleged in this case, is knowingly causing the mailing. *Pereira v. United States,* 347 U.S. 1 (1954); *Cf. United States v. Stanford, supra.* n. 5 The specific intent *mens rea* of §1341 is the specific intent to defraud, in this case, the disputed intent to "lull", which is the basis of the opinion of the Court of Appeals.

While it may be said that the Cross-Petitioners through their actions caused the mailings, because such was a foreseeable result of their acts, the conclusion does not follow that they preconceived a use of the mail or intended to lull their victims. Rather, as in the case of *U.S. v. Maze,* 414 U.S. 395 (1974), the delivery of the mailed matter was a foreseeable, but unforseen, unplanned, collateral consequence of the scheme. The causation *(actus reas)* element of mail fraud requires only the commission of an act with knowledge that the use of the mails will follow in the ordinary course of business, or when the use can reasonably be foreseen, even though not intended. *Pereira v. United States, supra* at 8-9, 74 S.Ct. at 358. Because a commercial use of the mails is objectively foreseeable in these circumstances, the law will impute to the Respondents the *actus reus* of knowingly causing the mailing even if they did not actually, subjectively, foresee or intend *(mens rea)* the mailing. The statute provides that a defendant must "cause" the use of the mails, but "a defendant will be deemed to have 'caused' the use of the mails . . . if the use was the reasonably foreseeable result of his actions." *United States v. Wrehe,* 628 F.2d 1079, 1085 (8th Cir. 1980). However, this constructive, "deemed", or imputed action does not supply the requisite *mens rea* of intent to "lull".

Foreseeability of mailing is not proof of, nor a substitute for, an intent to defraud nor an intent to "lull". The fraudulent intent necessary to a conviction for violating §1341 must be present at the time the defendant

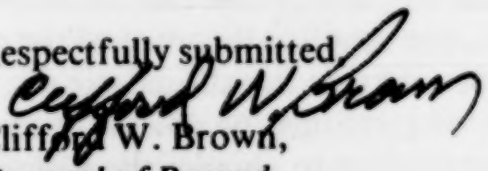
uses the mails or "knowingly causes" the use of the mails by others. *United States v. Gibson,* 708 F.2d 344 at 346 (8th Cir. 1983). The opinion of the Court of Appeals overlooks this basic principle of criminal law and imputes an intent to "lull" which was neither alleged, nor proved, but which was expressly disputed by the Respondent Dennis Lane. As there is insufficient evidence of an intent to "lull", and as this mental culpability can neither be imputed to the Respondents, nor supplied by proof of the *actus reas* alone, it cannot be said that the alleged use of the mails was for the purpose of executing the scheme. Accordingly, the evidence is insufficient to convict the Respondents. The oversight of the Court of Appeals in this regard will not serve to distinguish the case at bar from *Ledesma.*

The decision of the Court of Appeals has misconstrued this Court's opinion in *U.S. v. Sampson, supra,* especially with its interpretation of intent to lull in this case. The scheme reached fruition prior to any use of the mail. The use of the mails alleged in Counts 2, 3 and 4 cannot be, and were not "for the purpose of executing such scheme" as alleged in the Indictment, and therefore, the evidence is legally insufficient to convict the Cross-Petitioners and requires the entry of a judgment of acquittal. *Kann v. U.S., supra; U.S. v. Maze, supra; Parr v. U.S., supra; U.S. v. Ledesma, supra.*

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it holds that the misjoinder of count 1 was reversible error and reversed insofar as it holds that the evidence was sufficient to support respondents' convictions on counts 2 through 4, and a judgment of acquittal entered on those counts.

Respectfully submitted,



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